



Corporate impunity is common & remedy for victims is rare

Corporate Legal Accountability Annual Briefing

Executive summary	2
Introduction.....	3
I. Sustained impunity for corporate human rights abuses	3
1. Human rights defenders subject of attacks	3
2. Criminal law remains a major gap in corporate legal accountability.....	5
3. Space for civil claims narrowing in major jurisdictions	7
II. Opportunities to fight corporate impunity	8
1. Protection of human rights defenders	8
2. Criminal law as a new avenue for remedy.....	9
3. Civil claims that offer a way forward for victims of abuse.....	10
Conclusion & Recommendations	13

Follow our work on Corporate Legal Accountability

Business & Human Rights Resource Centre will continue to bring the concerns of local advocates to an international audience and profile additional lawsuits against companies – both under-the-radar and high-profile cases.

Our [Corporate Legal Accountability hub](#) provides accessible, up-to-date, concise case profiles on over 140 lawsuits in all parts of the world. It is frequently updated with new case profiles and news of on-going lawsuits. The profiles link to arguments from both sides of cases where available, as well as articles and commentaries. The portal demystifies cases in non-legal terms and also provides resources for lawyers and others working in the field. It provides an international platform for advocates and others to share information about corporate legal accountability and disseminate news about lawsuits to a global audience.

We publish a Corporate Legal Accountability Quarterly Bulletin in English, Chinese, French, Russian and Spanish. Past issues of this bulletin are available [here](#). If you wish to receive this bulletin, please contact us. Our previous Annual Briefings are available [here](#). All of our website's items on lawsuits and regulatory actions involving companies and human rights abuses are [here](#). Follow us on Twitter: @cla_bhrrc.

Please do not hesitate to get in touch with any questions or suggestions of material for our portal and website:

- Greg Regaignon, Research Director: [regaignon\[at\]business-humanrights.org](mailto:regaignon[at]business-humanrights.org)
- Elodie Aba, Corporate Legal Accountability Project Manager: [aba\[at\]business-humanrights.org](mailto:aba[at]business-humanrights.org)

Executive summary

Last year, Pavel Sulyandziga, a well-known indigenous leader in Russia and member of the UN Working Group on business and human rights spoke out against the threats and intimidation he and his family have faced after his work supporting local communities to retain control of their land from extractives companies. Pavel's organisation has since been declared a "foreign agent", leading to registration barriers and extensive audits. Pavel himself is facing criminal charges and is seeking political asylum in the US.

The aim of our Corporate Legal Accountability Annual Briefing is to highlight the latest legal developments in holding companies to account for human rights abuses, to share knowledge among lawyers and ultimately strengthen accountability. But so bad is the crisis of impunity, we must dedicate a significant portion of space to the threats to advocates working on corporate accountability and their response, as well as the legal opportunities they are pursuing to hold companies to account even as they are increasingly vulnerable and the gaps where legislative intervention is needed.

In previous Annual Briefings, we have highlighted the struggle of victims to access justice, enabling growing impunity companies have for human rights abuses. Pavel Sulyandziga's case shows the terrifying levels this has reached. It is a vicious circle; growing impunity sees unscrupulous companies emboldened to pursue profit at any cost, even targeting their critics, and attacks on advocates and lawyers chill efforts to hold companies accountable driving impunity.

Countless human rights defenders working on corporate accountability have faced killings, beatings and threats for demanding justice. Despite an increase in attacks, they are rarely, if ever, able to obtain justice. For example, over 90% of killings and abuses against Honduran human rights defenders reportedly [remain unsolved](#).

The law is often used as a weapon. In the last two years, Business & Human Rights Resource Centre has [tracked](#) 450 cases of attacks against human rights defenders working on corporate accountability. The most common is judicial harassment (40% of cases). Companies and government may win these cases, but the cost to wider society, including the business environment, is high.

This annual briefing has two key sections:

- I. **The impunity of unscrupulous companies regarding human rights abuses is increasing:**
 - Plaintiffs in lawsuits against companies and their lawyers are increasingly being subjected to repression and harassment.
 - Companies increasingly use courts as a weapon against those who seek to hold them responsible.
 - Criminal investigations and prosecutions against companies in cases of human rights abuses remain extremely rare despite widespread cases of companies involved in abuse rising to the level of potential crimes.
 - Prospects of success in civil claims for business-related abuses continue to shrink – with virtually no effective remedies in companies' home countries for most victims of abuses that occur abroad.

- II. **Opportunities to tackle impunity are emerging:**
 - Encouragingly, civil society has developed strong responses to protect human rights defenders, including with some governments and leading responsible companies who are increasingly concerned at the loss of civic freedoms.
 - Experts have identified how governments can use criminal law to hold companies accountable for criminal behaviour. A few governments are taking action.
 - Courts in some countries are increasingly prepared to hear civil claims over companies' responsibility for human rights abuses involving suppliers and subsidiaries.
 - Courts are also beginning to address a serious inequality of power between companies and victims by requiring companies to provide plaintiffs vital information.

We conclude with recommendations for governments, which have a critical role in protecting human rights defenders and advocates, and for companies and their lawyers. 2016, was a year of rising chauvinist nationalism, with Brexit and the election of Donald Trump only throwing into vivid relief a trend that had been gaining in other countries in recent years, putting human rights and their defenders at great risk and limiting opportunities to hold companies accountable. This means safeguarding and strengthening the civic freedoms that allow advocates and lawyers to speak truth to power, and to seek accountability and remedy for abuses, is more critical than ever.

Introduction

The impunity of companies for involvement in human rights abuses is increasing, and in the context of increasing economic nationalism, it is likely to get worse – particularly where business interests are able to ride populist nationalist politics to acquire deep influence and insulate themselves from accountability. Companies are increasingly targeting activists, using the justice system to hold them accountable with repression and lawsuits, as Sarah Labowitz’s [resignation letter](#) from ExxonMobil’s External Citizenship Advisory Panel illustrates: "I am disappointed that instead of examining its own record and seeking to restore a respected place for itself in the public debate, Exxon has chosen to turn up the temperature on civil society groups." However, some emerging initiatives offer hope for greater corporate legal accountability.

I. Sustained impunity for corporate human rights abuses

1. Human rights defenders subject of attacks

Human rights defenders have always played an essential role in the fight for justice of the communities they represent. Ken Saro-Wiwa, the co-founder of the Movement for the Survival of the Ogoni People who fought against Shell and the Nigerian Government over the effects of oil pollution, was executed in 1995. His family sued Shell for alleged complicity in his execution, and settled a [lawsuit](#) with Shell for \$15.5 million in 2009. His story stresses the vulnerability of activists working for corporate accountability. The [latest report](#) of the United Nations (UN) Special Rapporteur on the Situation of Human Rights Defenders highlights the “increasing and intensifying violence against them.” 185 environmental activists across 16 countries were killed in 2015, an increase of 59% in comparison to 2014, Global Witness [reports](#). Our [database of attacks against human rights defenders](#) directly working for corporate accountability in 2015 and 2016 confirms this trend with over 450 occurrences worldwide. Despite an increase in attacks, there is no justice for the victims. For instance, [according to human rights organizations](#), over 90% of killings and abuses against Honduran defenders remain unsolved.

Human rights defenders involved in legal cases have been subject to repression, threatened and even killed

Human rights defenders are most vulnerable in Latin America - as shown in our database - where numerous advocates involved in legal cases have been threatened or harmed. In Mexico, environmental lawyer [Eduardo Mosqueda](#) of Instituto de Derecho Ambiental (IDEA) represented an indigenous community in a land dispute related to the mining company Peña Colorada (jointly owned by Ternium and ArcelorMittal), including through a constitutional petition asking for recognition of the community’s land rights. After the court granted the community free access to the lands, Eduardo Mosqueda was detained for 10 months for protesting together with community members. After a judge annulled the charges against him, he was released in May 2016.

In Guatemala, the home of human rights lawyer Ramón Cadena Rámila, a representative of the International Commission of Jurists, was [ransacked](#) in August 2016 as part of a campaign of intimidation against lawyers. He represents the La Puya community in their fight against the [gold mine of Kappes, Cassidy & Associates](#). Several law societies as well as the [International Bar Association](#) urged the Guatemalan Government to take effective measures to protect lawyers and investigate the incident.

In Colombia, Hilduara Barliza, a Colombian lawyer and Wayúu indigenous leader, [received death threats](#) in December 2016. She and her people oppose the expansion of El Cerrejón coal mine and its proposal to divert a river, due to the negative impact on their lands and water resources. Javier Rojas Uriana, another representative of the Wayúu, continued to receive [threats](#) due to his work, which includes a successful case in which the Inter-American Commission on Human Rights (IACHR) [adopted provisional measures](#) asking the Colombian Government to protect children from serious risks of lack of access to water linked to the mining project.



Photo credit: wayuunaiki.com.ve

In South Africa, Sikhosphi “Bazooka” Rhadebe, the chairman of Amadiba Crisis Committee, was [killed](#) in March 2016, and his colleague, Nonhle Mbuthuma, has been facing death threats. Their committee is made up of locals opposed to the Xolobeni mining project that was being developed by the Australia-headquartered company MRC, over concerns that it would impoverish them and destroy their environment. They had filed a legal objection to the company’s application for regulatory approval to begin mining in early March 2016.

In 2016, the Chinese Government intensified its crackdown on human rights lawyers. Over 240 lawyers and activists were questioned by police, detained or charged for subverting state power. This included lawyers involved in business and human rights cases such as Jiang Tianyong who disappeared in November 2016. The police have [confirmed](#) that he was in police custody and later informed his family that he is under “residential surveillance,” another form of detention, but have not disclosed where. He had been involved in high profile cases and represented victims of the [2008 scandal over deadly tainted milk](#).

While courts exist to provide justice, companies and governments use courts and legal action against lawyers and human rights defenders, including trade unionists

Globally, of the 450 cases of violence, threats and harassment in 2015-16 included in our [Human Rights Defenders Database](#), 166 involved criminalisation and legal harassment of activists and their actions, including 64 cases of lawsuits against them and 75 cases of arbitrary detention. This type of attacks occurs most frequently in cases involving the mining sector (46 instances).

Trade unionists are often threatened and sued by companies due to their activities. In South Korea, YooSung Enterprise (a Hyundai Motor supplier), [filed](#) 11 criminal charges against trade unionist Han Kwang-ho between July and December 2013, in retaliation for his trade union activities at the factory. After years of fighting the charges, Han still faced two charges – which the union insisted were false – when he committed suicide in 2016.



Photo credit: Andy Hall

Andy Hall, a British labour rights activists and researcher, was [sued](#) in Thailand by Natural Fruit for criminal defamation following a report that alleged labour abuse against migrant workers in the company's factories. In September 2016, a Thai court found him [guilty of defamation](#). ([He has appealed](#).) Human rights advocates said this decision would hinder efforts to investigate abuse in companies’ supply chains in the country. In November, Andy Hall was cleared of another criminal defamation charge. Other civil defamation claims against him by Natural Fruit are still pending. Brad Adams, Asia director of Human Rights Watch, [stressed the danger of such lawsuits](#): "The concern is that we will see copycat prosecutions from other companies anytime someone criticises them."

On 2 September 2016, 14 Myanmar migrants [filed a lawsuit](#) at a labour court in Thailand, against Betagro, a major Thai food corporation. They claim that they were subjected to forced labour and other workplace abuses at a poultry farm, Thammakaset 2, that supplies Betagro. In response to the claim, the owner of Thammakaset 2 [filed a defamation lawsuit](#) against the workers and Andy Hall in October. Two of the workers have been prosecuted for criminal theft in relation to alleged theft of their time cards from their employer to show 20+ hour work days.

Actions like these against advocates do not only occur to try to quash labour rights. Similar actions target advocates seeking to help communities protect their rights to natural resources

In February 2016, six activists opposing the use of villagers’ land for Socfin plantations were [jailed](#) after a Sierra Leone court found them guilty of destroying 40 oil palm plants. The activists [say](#) they are innocent and see the trial as a “tactic to get us into prison so that we cannot raise our voice on the unacceptable land deals in Malen Chiefdom.” More recently, in Madagascar, two leaders of communities protesting over the loss of lands and livelihoods to Jiuxing Mine’s project were [arrested and given a one-year suspended prison sentence](#) on charges of blocking roads and encouraging protests. They are [appealing](#) the decision.

Many NGOs, including those working on corporate accountability, face prosecution over trumped-up corruption charges, arbitrary audits, heightened tax scrutiny and other forms of legal and administrative harassment. For example, pressure by the Russian government has driven Pavel Sulyandziga, a well-known indigenous leader and member of the UN Working Group on business and human rights, to seek political asylum abroad. In March 2016, the "Batani" fund, that Pavel was leading, was [declared a "foreign agent"](#) by the Ministry of Justice, following an unannounced audit of its files. The same year, a criminal case was also brought against him over misappropriation of funds; he claims the charges are fabricated.

In France, the NGO Sherpa filed a criminal complaint in March 2015 against Vinci and its Qatari subsidiary, QDVC, over alleged forced labour on their construction sites in Qatar. The company denied the claims and brought two lawsuits against the NGO: one [for defamation](#) and the other [for undermining the presumption of innocence](#). Sherpa [denounced](#) the lawsuits as a means for the company to stop the NGO from pursuing the claim, tying up Sherpa's resources in defence of Vinci's two lawsuits.

During our mission to Indonesia in September 2016, we met with the NGO KontraS, which is currently campaigning against criminalisation of human rights defenders, including those working on economic and social rights. It stressed that the situation had worsened, with severe penalties being sought against them under the Law on Information and Electronic Transactions. For instance, an activist from the NGO WALHI (Friends of the Earth Indonesia) [faced a criminal defamation complaint](#) under this law, by supporters of a land reclamation project in Bali over a Twitter post that mocked them.

In 2016, the case of Sergey Nikiforov, an Evenk indigenous people's leader and environmental rights defender, was put back in the spotlight when the UN Special Rapporteur on the Situation of Human Rights Defenders [urged](#) Russia to investigate allegations that a court decision [sentencing](#) him to four years of prison in December 2015, allegedly for bribery, was unwarranted. Locals and NGOs believe that he was actually imprisoned for having led his village's protests against the operations of the mining company Petropavlovsk, due to their human rights and environmental impacts. The Russian Government has yet to respond.



Photo credit: ampravda.ru

2. Criminal law remains a major gap in corporate legal accountability

Our [Corporate legal Accountability Project](#) has been tracking lawsuits against companies over alleged human rights abuses for nearly a decade. Of the 227 lawsuits that we have profiled, only 37 have involved criminal charges, even though many more of these cases involve gross violations of human rights. And of the 37, only 13 have resulted in verdicts against companies or their managers or employees. Companies and their managers and employees involved in serious abuses rising to the level of crimes are, simply, very rarely prosecuted and convicted.

When victims of abuse seek civil remedies, they must spend time and money pursuing their cases, which is particularly onerous for poor and marginalised groups. Yet, they must do so in many cases where governments do not meet their duties to investigate and prosecute abuses that rise to the level of crimes.

According to the International Trade Union Confederation's Global Rights Index 2016, killings of trade unionists occurred in [11 countries](#), including Chile, Egypt, El Salvador, Guatemala, Honduras, South Africa and Turkey. In Honduras, over 30 trade unionists were killed in the past six years. Tomás Membreño Pérez, a leader of the Union of Agroindustrial and Related Workers (STAS) and his family [received deaths threats](#) for trying to organise workers. He claims that the authorities did not investigate. There have been a few attempts to hold companies or their representatives accountable for alleged involvement in killings of trade unionists in the past (for example, [lawsuit against an ex-Drummond executive over killings of trade unionists in Colombia](#); [lawsuits against Ford over abductions and torture of union members during the "dirty war" in Argentina](#); [lawsuit against Nestlé in Switzerland over complicity in killing of Luciano Romero in Colombia](#)). In recent years, with a few exceptions regarding trade unionists in Colombia (including [Chiquita](#) under the US Anti-Terrorism Act), companies have not been prosecuted despite their implication in killings of trade unionists.

Several recent cases illustrate how criminal law has failed to close the gap that provides impunity for companies involved in abuse. The standard of proof required in criminal law is higher than in civil law, making criminal prosecution more difficult. In many cases, the higher evidentiary threshold could be surmounted with adequate resources for investigators, or training or experience needed to analyse specific evidence, but these are often lacking. For example, when 17 people died and thousands required medical attention following the dumping of oil waste in Abidjan, Côte d'Ivoire, Trafigura eventually paid over \$100 million to settle multiple [legal claims](#). But UK authorities [declined to investigate](#) possible criminal charges due to "limited experience in complex investigations" and lack of "appropriately skilled and experienced staff".

In 2008, following the construction of the Merowe dam in northern Sudan by the German contractor [Lahmeyer International](#), more than 30 villages were flooded causing displacement and destruction of livelihoods. In May 2010, the European Center for Constitutional and Human Rights (ECCHR) submitted a [criminal complaint](#) to the public prosecutor in Frankfurt am Main against two Lahmeyer employees. Although prosecutors conducted investigations over five years, in April 2016 they [closed the case](#), saying they could not establish criminal intent, and that Lahmeyer and its employees had no legal duty to check if the affected population had been resettled before the flooding started. ECCHR says, "the prosecutors applied an overly restrictive interpretation of the scope of the obligations of managers who do business with governments like the Sudanese. The Lahmeyer case once again highlights the inadequacy of the current definition of managers' human rights obligations when operating abroad and the urgent need for a reform of the applicable laws".

Even in some cases where prosecutors are presented with significant evidence, they may nevertheless decline to open an investigation. In December 2016, Lithuanian victims of trafficking received a £1 million civil settlement in the UK in the [first modern slavery lawsuit against a British company](#). Police had raided houses belonging to the owners of the company, DJ Houghton Chicken Catching Services, in 2012, and liberated over 30 men believed to be victims of trafficking. However, the Crown Prosecution Service declined to pursue the case for reasons unknown to the victims' lawyers. They expressed [frustration](#) with this decision, given the amount of evidence found.



Photo credit: Leigh Day

Corporate and political influences can block criminal investigations; Seema Joshi of Amnesty International [notes](#), "the power and financial clout of corporations makes authorities reluctant to act. This often means that there is total impunity for companies when they are involved in criminal activity."

Law enforcement agencies and prosecutors may also not pursue charges against companies for human rights abuses or prioritise corporate crimes due to a lack of familiarity with the subject, or a lack of skills and resources. Establishing criminal liability for companies can present particular evidentiary challenges.

Even where criminal prosecutions are pursued, companies and their executives often escape punishment. Among the 37 criminal lawsuits that we have profiled and analysed, only 13 ultimately resulted in penalties or remedy for the victims (prison sentences for perpetrators, compensation or settlement), and of these, five were criticised for being too lenient.

Legal proceedings are often very lengthy and criminal prosecutions are no exception. Among the criminal cases in our database, 16% lasted for 5 years or more. The [Eternit case](#) over workplace deaths from asbestos exposure in Italy, is an example of a lengthy trial that has lasted over 10 years, yet has still not resulted in any penalties for the company or its officials, or relief for victims and their families. In 2004, Turin's public prosecutor began an investigation after being contacted by families of asbestos victims. Five years later, the trial began, charging two former Eternit directors for failing to take appropriate safety measures despite knowledge of the dangers. Following a series of appeals, in 2014, the Italian Supreme Court overturned the lower court decision and acquitted former CEO Stephan Schmidheiny because the statute of limitations had passed. In November 2016, 12 years after the families sent their initial statement to the prosecutor, a judge ruled that the cases that had not timed out would be downgraded from manslaughter to involuntary manslaughter, and transferred them to another prosecutor's offices to begin a new investigation. The victims' lawyer [noted](#) that the transfer would significantly lengthen the time "before the cause of and responsibility for these deaths can be ascertained" – only prolonging a saga that first began over 12 years ago.

Another concern with criminal prosecutions is that judgements often do not match the severity of the crime, and victims do not receive adequate reparation for the harms they suffer. Following the deaths of 19 people in a fatal fire at the [Villaggio Mall in Qatar](#), the public prosecutor in Qatar brought a criminal case against seven individuals. In April 2016, a judge fined the mall and the nursery owners and managers 200,000 riyals (about \$55,000) to each victim's family, but ordered no prison time. The general prosecutor appealed the verdict but it was affirmed in February 2017.

Cross-border criminal prosecutions raise additional challenges related to jurisdiction. Many criminal statutes only apply within a state's territory, so law enforcement and prosecutors may not have jurisdiction to investigate and prosecute crimes committed by companies abroad. For example, former [Blackwater security contractors](#) were found guilty in a US prosecution over a shooting in Baghdad that left 14 people dead in 2007. But in February 2016, they appealed their convictions, arguing that prosecutors [lacked jurisdiction to bring the case](#).

3. Space for civil claims narrowing in major jurisdictions

Space for extraterritorial claims before civil courts continued to narrow worldwide in 2016. The situation has not improved since we highlighted this trend in [our 2015 Annual Briefing](#), and the analysis of the lawsuits we track show that 40% are extraterritorial claims. There is no access to remedy in companies' home countries for a vast majority of victims of abuses that occurred abroad as the examples below show.

In 2011, a Chinese subsidiary of the ConocoPhillips, caused an oil spill in the Bohai Sea in China, which severely damaged the ecosystem and greatly affected the livelihoods of local fishermen. A year later, some of the affected fishermen, from Shandong province, filed a [lawsuit against ConocoPhillips](#) in Texas, USA, where ConocoPhillips is headquartered; and other affected fishermen, from Hebei province, filed a petition in Texas court to depose ConocoPhillips' executives, seeking evidence directly related to claims they had filed in Chinese court. The lawsuit [shows](#) how extraterritorial claims are crucial for victims when there is no hope of justice in their own country, as the plaintiffs argued: "[t]his suit is the only chance a group of fishermen has to get justice for the devastating effect on their lives of a series of massive oil spills... [P]laintiffs enter this American court only because the Chinese government has blocked access to its own court system." But in November 2016, a US federal court dismissed the civil claim of the Shandong fishermen, [on the grounds](#) that the lawsuit is Chinese and "has nothing to do with the US", as well as the petition to depose ConocoPhillips executives.

In the [lawsuit in US court against Union Carbide concerning the Bhopal gas disaster](#), victims have been fighting for real remedies, and to hold the company accountable, for 17 years. They seek compensation for the 1984 leak at a Union Carbide (now part of Dow) pesticide plant and for the environmental contamination at and around the site. After a number of appeals, the victims' claims for compensation for injuries directly related to the incident, were dismissed in 2006 because these claims were barred by a 1989 settlement between Union Carbide and the Government of India. With regard to environmental contamination, and after years of further proceedings and appeals, a New York court ruled that Union Carbide was not liable for the incident despite strong evidence the company's chemical plant continues to cause water pollution in Bhopal, India. The final appeals were exhausted in August 2016. As Marco Simons of EarthRights International [said](#), "the courts are supposed to be an avenue for justice. But, time and time again, that has not proven to be true for the people of Bhopal."



Photo credit: Yann/Wikimedia Commons

Despite the enormous global attention to fossil fuel and energy companies' climate impacts, lawsuits against companies over the harms caused by climate change to vulnerable populations have had little success to date. In a [lawsuit in German court against the German energy company RWE](#), a Peruvian farmer alleged that RWE has been a major emitter of greenhouse gases, which are causing glacial retreat, leading to a serious increase in the risk of catastrophic flooding of his village. On 15 December 2016, the lawsuit was dismissed on the grounds that the plaintiff had not established that RWE was legally responsible for protecting the city of Huaraz from flooding. The farmer appealed the decision in January 2017.

These examples illustrate the difficulty in access to remedy for victims but there are some opportunities that offer hope in this regard.

II. Opportunities to fight corporate impunity

1. Protection of human rights defenders

Facing the rising threats and harms to human rights defenders and civic space detailed above, civil society has mounted some robust responses. Certain leading companies have also participated in protecting defenders from legal threats, and some governments have sought to ensure that companies do not use the law to stifle credible human rights claims, and harass their critics.

Governments' duty to protect human rights defenders includes ensuring that laws cannot be used to stop legitimate advocacy for victims of abuse¹. For example, governments should protect advocates from strategic lawsuits against public participation (SLAPPs). SLAPPs are often filed by companies to intimidate and silence people seeking to participate in matters of public interest, burdening them with legal costs until they abandon their criticism or opposition – and can thus bar victims from accessing justice. The Australian Capital Territory passed the [Protection of Public Participation Act 2008](#) to protect its citizens against the chilling effects of SLAPPs. In the US, [28 states and the District of Columbia](#) have enacted anti-SLAPP legislation. In Canada, some provinces have started to address this issue, most recently Ontario with its [Protection of Public Participation Act](#). Its supporters [argued](#) that it levels the playing field and will prevent companies from using lawsuits to suppress criticism. A number of governments, such as Canada, the Netherlands and the UK have also developed policies for embassies in repressive states that emphasise providing support for human rights defenders.

Many defenders have faced prosecution under criminal defamation laws. Making defamation a criminal offence is a harsh and disproportionate punishment. International organizations ([African Commission on Human and Peoples' Rights](#), [UN](#), [OSCE](#)) and leading NGOs ([Article 19](#), [International Commission of Jurists](#)) have advocated for its decriminalisation.



Photo credit: Adam Jones/Wikimedia Commons

Among other measures, civil society and international organizations are increasingly focusing on the protection of whistle-blowers and advocates, particularly in legal cases. In October 2016, a group of legal experts in business and human rights, with the support of Amnesty International and the International Corporate Accountability Roundtable (ICAR), launched a set of [Corporate Crimes Principles](#) that provide guidance for governments and law enforcement on how to advance the investigation and prosecution of corporate human rights abuses. To protect victims and their lawyers, Principle 10 encourages states to “put in place appropriate measures and incentives to protect victims, informants, whistle-blowers, witnesses

and experts in corporate crimes cases.” This supports similar recommendations by the Office of the UN High Commissioner for Human Rights (OHCHR) to improve accountability and access to remedy for victims of business-related human rights abuse. In its 2016 [report](#) to the UN Human Rights Council, it included among key actions identified to enhance access to remedy, that enforcement agencies should ensure the safety of victims, human rights defenders, witnesses, whistle-blowers and their legal representatives (Policy objective 7).

The criminal defamation prosecution of Andy Hall in Thailand, mentioned in section I., also illustrates how leading companies can play a positive role in supporting human rights advocacy. In December 2016, 110 signatories representing civil society organizations, unions and worker organizations, companies, and members of the European Parliament signed [a letter](#) calling on Thailand to protect human rights defenders and migrant workers.

¹ See the UN Declaration on Human Rights Defenders : <http://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf>

The Thai Tuna Industry Association and the Thai Frozen Food Association expressed support to Andy Hall by paying his bail when he was charged. Most notably, the Senior Vice President for Sourcing of S Group, a large Finnish retailer that sourced from Natural Fruit (and ultimately terminated their business relationship when Natural Fruit objected to independent audits), testified in 2016 in favour of Andy Hall at his trial. The company [explained](#) the reasons behind its decision: “Andy Hall asked us to give a testimony and as a responsible company we decided to testify, because S Group is part of the value chain of this case... It is in the interest of companies, too, to have a functioning civil society.”

Major global jewellery companies, including Tiffany & Co., similarly used their position to speak up for [Rafael Marques](#), who was prosecuted for libel by the Angolan Government over his book documenting torture and killings in the Angolan diamond mining industry.

Preserving the civic space for human rights, environmental and labour advocates to operate freely can help protect companies from major operational risks, including legal liability. Duncan Green of Oxfam GB [argues](#), “human rights defenders act as a form of unpaid due diligence for companies, keeping them alert to risks emerging within the system. So it makes sense to defend them.”

Although some companies have already taken steps to respect human rights by establishing grievance mechanisms, most of these mechanisms do not meet the effectiveness criteria referred to in the UN Guiding Principles – that they be legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, and based on engagement and dialogue. Adidas’ [complaint mechanism](#) process does show the way forward in this regard, as it is aligned with the UN Guiding Principles. Adidas is also the first company to have recently adopted a [human rights defenders policy](#), which could serve as model for other companies. It [refers](#) to the United Nations’ definition of human rights defenders, and commits the company to take direct action where there is clear evidence that their business partner has breached the rights of defenders.

2. Criminal law as a new avenue for remedy

Governments’ duty to protect against human rights abuses, including those committed by corporate actors, requires pursuing proportionate penalties when these abuses do occur. Although criminal liability is rarely imposed for serious human rights harms involving companies, several efforts are underway, including by the United Nations, to demystify the issues and find ways forward. OHCHR’s [report](#) on access to remedy details pragmatic policy objectives, including to support the work of law enforcement and prosecutors. It advises giving them a clear mandate and political support to address corporate crimes (Policy objective 4) as well as the necessary resources, training and expertise (Policy objective 6). The guidance also recommends cooperation between agencies and courts in cross-border cases, as a key to effective investigation and prosecution (Policy objective 9).



Photo credit: Clyde Robinson

In parallel, as mentioned above, the [Corporate Crimes Principles](#) developed by a team of legal experts, working with leading international NGOs, recommend capacity-building of law enforcement agencies to investigate, prosecute and prioritise corporate crimes (Principle 1) and facilitate international cooperation (Principle 5). These Principles also recommend:

- development of stronger legislation where corporate criminal liability laws are ineffective or non-existent (Principle 1);
- ensuring that prosecutors and law enforcement are independent, and free to investigate crimes without fear of undue corporate influence (Principle 3); and
- reforming criminal justice systems to better accommodate victims’ rights (Principle 9).

One model, for stronger corporate crimes legislation, [suggested](#) by these Principles: The [UK Bribery Act 2010](#), imposes criminal penalties if a company fails to prevent bribery committed by its agents and employees, unless the company demonstrates that it has effective procedures in place to prevent bribery. In 2017, the UK Criminal Finances Bill will introduce a new corporate offence of failing to prevent tax evasion. This form of corporate

criminal liability could be extended past these economic crimes to require companies to implement due diligence measures to prevent corporate human rights abuses – and impose criminal penalties when they fail to do so.

A few other governments have recently taken significant steps to strengthen corporate criminal liability. In 2015, the US passed the Trade Facilitation and Trade Enforcement Act, which prohibits imports produced with forced labour. Failure to comply may lead to the criminal [prosecution of the importers](#). In November 2015, members of Vietnamese National Assembly passed a new penal code making companies in Vietnam [liable for crimes for the first time](#), including environmental crimes such as water pollution, and labour rights violations.

In the courts, several new cases show how criminal law can be used to seek corporate accountability for human rights abuses.

In Brazil, federal prosecutors filed [homicide charges](#) against 21 people, including top executives of BHP Billiton, Vale and Samarco, for the 19 deaths resulting from the Bento Rodrigues mining dam collapse and tragedy in 2015. In November 2016, a federal judge accepted the charges. The prosecutors allege Samarco's board was informed of structural problems and the likely consequence of a deadly dam collapse but responded by pressuring the company to extract more iron ore. Samarco officials maintain that the disaster was impossible to foresee. "The criminal investigation plays an extremely important role in unveiling the chain of actions and omissions that ended in this disaster. It will test Brazil's criminal justice system's capacity to hold corporations and administrators accountable for environmental crimes", said Caio Borges of Conectas, a Brazilian NGO.

In February 2016, affirming a conviction of three companies for crimes against public health, where the companies were used by their directors to traffic drugs, the Spanish Supreme Court [ruled for the first time](#) that a company could incur criminal liability. The requirements it set out resemble the UK's failure to prevent rules for bribery.

3. Civil claims that offer a way forward for victims of abuse

Looking past formal business structures: Accountability for actions of subsidiaries & suppliers

It is often difficult for victims to seek remedy in the country where the abuses occur. Even in countries with well-functioning judicial systems, the responsible subsidiary may not have enough assets to compensate the victims, and the government may not be willing to hold it accountable for political or economic reasons. In many cases, parent companies are able to shield themselves from liability because they are separate legal entities from their foreign subsidiaries. For example, in the Bhopal tragedy in India, Union Carbide India Limited, a subsidiary of Union Carbide Corporation (UCC), was operating the plant when the gas leak occurred. The plaintiffs against Dow, which later merged with UCC, argued [in US court](#) that UCC/Dow should be held liable, and claimed they could prove that an employee of UCC managed the construction of the plant. In 2016, a US court rejected their call to "pierce the corporate veil" and allowed a lower court decision that UCC was not liable to stand.

Attempts to hold a brand liable for abuses in its supply chain also usually face many legal hurdles. However, courts have been increasingly ready to hear claims concerning the liability of companies over human rights abuses through their business relationships, not just in their own operations.



In 2012, a fire broke out at the Ali Enterprises garment factory in Pakistan, killing over 260 people and injuring dozens more. Three years later, survivors and relatives of victims [filed a compensation claim against the German company KiK](#), which was the factory's main customer, in German court. They argue that KiK shares in responsibility for the injuries and deaths due to the lack of fire safety measures at the factory. This lawsuit is a signal to transnational corporations that they can be held responsible for the working conditions at their subsidiaries and suppliers' companies. In August 2016, a German court decided to grant legal aid to the victims and their families, and accepted jurisdiction. According to Miriam Saage-Maaß of ECCHR, assisting the claimants with the case, this was a

Photo credit: Clean Clothes Campaign

historical decision and a “first step towards dealing with the human rights violations committed abroad by the German companies.”

There are other examples of cases showing this evolution. For instance, in October 2016, the Supreme Court of British Columbia, in Canada, rejected Nevsun’s motion to dismiss the [lawsuit over its alleged complicity in forced labour](#) at the Bisha mine in Eritrea. It [ruled](#) that the case should proceed in British Columbia as there were doubts that plaintiffs would get a fair trial in Eritrea. According to Tamara Morgenthau of EarthRights International, this case “marks a [significant step forward in victims’ fight for access to justice](#) against Canadian corporations involved in human rights abuses outside of Canada.” This decision also has [implications for many more Canadian companies](#) that do business with governments or suppliers with poor human-rights records.

Access to information

Courts are also beginning to address one of the greatest inequalities of power between companies and victims of abuse by providing greater measures for plaintiffs against companies to access information in court cases.

[Access to information](#) for victims is crucial for gathering evidence to find a causal link between the harm they suffered and the company’s activity in order to hold the company accountable. They may also need information about the governance structure of the company to decide where to bring a complaint, or to prove the parent company controlled the subsidiary who committed the abuse. Obtaining relevant company documents is particularly important in complex natural resources and land cases. For instance, for lawyers and advocates in Indonesia, company information, including maps that show plantation boundaries are essential evidence to bring a strong case in [haze-related claims](#).

However, access to information depends on the jurisdiction and often remains difficult. In Egypt, several cases relating to coal air pollution by factories are being litigated (against [Titan Cement Egypt/Alexandria Portland](#) and against [Lafarge and Suez Cement](#)). In the Lafarge case, plaintiffs seek to obtain the environmental impact assessment that was carried out before the company started its operations. They decided to launch a lawsuit after not receiving satisfactory responses from the companies and the Environmental Affairs Agency. The case is on-going and advocates for environmental justice in Egypt and the region are closely watching this case to see how the court will address arguments that the companies are violating rights to health, healthy environment, participation and access to information, as enshrined in the Egyptian Constitution.

Unlike common law countries where discovery rules are broad and well defined, civil law countries have a more restrictive approach that may prevent NGOs from pursuing a case before the courts. ECCHR gave us examples of hurdles it faced due to the German civil law system and its lack of discovery rules. With regard to labour conditions and allegations of forced labour for migrant workers on the World Cup construction sites in Qatar, the NGO could not investigate the supply chains of European construction companies operating there and thus, it made it difficult to file a civil compensation claim. If it had been able to gain access to internal information (emails, board meetings reports and notes etc.) it would help understand how the companies’ supply chains operate and the influence of the parent company on operations on the ground. This would have enabled the NGO to have more elements to build a liability argument for legal action.



Photo credit: Richard Messenger

Recently, courts have been willing to satisfy victims’ requests and compelled companies to hand over documents. A few years ago, the Supreme Court of Appeals of South Africa [ordered](#) Arcelor Mittal South Africa to disclose various environmental documents to the plaintiffs, including its environmental “Master Plan” – a comprehensive strategy document with a 20-year plan to address pollution and rehabilitate sites. The Vaal Environmental Justice Alliance sued Arcelor Mittal after it refused its request under the Promotion of Access to Information to provide documents related to its activities and their environmental impact. The Supreme Court

of Appeal's decision set a precedent on community access to corporate environmental records. It also highlighted the importance of transparency on environmental issues: "Corporations operating within our borders, whether local or international, must be left in no doubt that in relation to the environment in circumstances such as those under discussion, there is no room for secrecy and that constitutional values will be enforced."

In the [lawsuit against Shell in the Netherlands over oil pollution in Nigeria](#), a Dutch appeals court ruled in December 2015 that Shell must grant the claimants access to certain internal company documents essential to the case." This is the first time in legal history that access to internal company documents was obtained in court. An appropriate ruling, because these documents may contain important corroborating evidence regarding the oil spills caused by Shell and affecting these farmers' land and fishing ponds. This finally allows the case to be considered on its merits" [declared](#) Channa Samkalden, a lawyer representing the farmers.

In the US, there is a useful instrument to help victims in a foreign country obtain relevant information from companies based in the US. The [Foreign Legal Assistance \(FLA\) statute, 28 U.S.C. § 1782](#), enables interested parties to a lawsuit in a foreign country to ask a US federal court to assist them in obtaining testimonies and documents from companies or people based in the US. The FLA request enables the parties to benefit from the US' broad discovery rules and procedures. Thus, being very helpful to victims to hold companies accountable when their legal system has limited rules concerning access to information. EarthRights International has been using FLA strategically [in three cases](#) – in the past companies were the ones usually using this statute.

The need to act on access to information is stressed in OHCHR's [report](#) on improving accountability and remedy for victims of corporate human rights abuse mentioned above. Policy objective 18 encourages states to enhance access to information for plaintiffs and their representatives in transnational cases by engaging in various forums and initiatives.

Conclusion & Recommendations

The ability to obtain justice through the courts is fundamental to realise the rights of victims of abuses to obtain remedies for harm, to stop corporate impunity, and to protect human rights defenders. As noted in the UN Guiding Principles, effective judicial mechanisms are at the core of ensuring access to remedy and are part of the state's responsibility to protect human rights. They can play a powerful role in deterring future abuse, compelling effective preventive due diligence by companies, and fostering greater respect for the rights of workers and communities. Moving forward, in order to end corporate impunity and strengthen access to justice:

Governments should:

- Work together with global or regional groups of like-minded states that value human rights and democratic freedoms to create a consistent legal framework bringing together the best from current proposals and existing national initiatives, to avoid a race to the bottom on human rights, civic space and business, and ensure mandatory due diligence and access to remedy
- Take measures to protect human rights defenders, whistle-blowers, trade unionists, victims and their lawyers against harassment, and provide an enabling environment for those working on corporate legal accountability:
 - Enact and/or enforce laws that provide effective remedy for victims of corporate human rights abuses and their advocates, including:
 - addressing strategic lawsuits against public participation, following the example of legislation developed in other countries such as Canada (Ontario Protection of Public Participation Act 2015)
 - decriminalising defamation
 - Ensure embassy personnel have the necessary training, mandate and guidance from their relevant ministries to protect human rights defenders in repressive states
- Take measures that strengthen accountability:
 - Establish mandatory due diligence for companies, with remedies for victims when effective due diligence is not undertaken
 - Improve disclosure requirements and access to information for victims of abuse, including by creating or enhancing broad discovery procedures
- Take steps to strengthen corporate criminal liability to deter abuses and provide remedy when they occur, including ensuring that enforcement agencies and prosecutors receive the necessary training and resources to successfully investigate and prosecute corporate crimes

Companies and their lawyers should:

- Join forces with other progressive companies at the company leadership level and work throughout their subsidiaries, contractors, and supply chains, particularly in high-risk countries, to:
 - send a consistent message to condemn and work against attacks on human rights and environmental defenders and trade unionists, harassed in connection with the companies' supply chains or wider sector's operations
 - avoid collusion with government actions to close civic space
- Refrain from using legal tools to hinder activities of human rights defenders and access to justice for victims
- Establish grievance mechanisms respecting the effectiveness criteria of the UN Guiding Principles (following the example of [adidas](#)) and take meaningful measures to protect whistle-blowers
- Fully cooperate with state criminal investigations into potential wrongdoing by their employees, suppliers, subsidiaries, and contractors